BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: December 18, 2000
Case Nos: 2000-INA-215

In the Matter of:

NEWPORT TRIM CONSTRUCTION

On Behalf of:

NATANAEL PERALTA
Alien

Appearance: Jean-Pierre Karnos
for the Employer and the Alien

Certifying Officer: Armando Quiroz, San Francisco

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Natanael Peralta ("Alien") filed by Employer Newport Trim Construction ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On August 28, 1998, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Framer (Construction) in Employer's General/Trim Construction company.

The duties of the job offered were described as follows:

"Cut, fit, assemble, install and repair structures and fixtures of wood, plywood, and wallboard, using carpenter's hand tools and power tools such as drill press, power and hand saw, chisels, planes, sanders and hammer. Join said materials with nails, screws, staples or adhesives. Read sketches, blueprints, or building plans to determine dimensions of structure to be erected conforming to local building codes. Design and prepare layouts by using rulers, framing square, and calipers. Construct framework for structures and lay subflooring. Assemble chutes and forms for cement pouring."

An eighth grade education and two years experience in the job, were required. Wages were $14.50 per hour. The applicant supervises 0 employees and reports to the Owner. (AF-22-121)

On December 29, 1999, the CO issued a NOF proposing to deny certification. The CO stated that the occupation of carpenter "..is one for which a prevailing wage determination has been made under the Davis-Bacon and/or Service Contract Act(SCA). This wage is considered to be the prevailing wage for labor certification purposes. The issue is whether the occupation is one where a Davis-Bacon and/or SCA prevailing wage determination has been made, not whether the employer has a contract with the Federal government." Corrective action was to amend the wage to the prevailing wage of $23.80 per hour.(AF-18-20)

On January 20, 2000, Employer forwarded its rebuttal contending that the Davis-Bacon Act is inapplicable to this case

since that Act is meant to deal exclusively with government contracts. Employer stated: “Notwithstanding the likelihood that the Davis-Bacon Act is not applicable to this case, a recent review of the Employment Development Department’s (EDD) Labor Market Information Division indicates that the median wage for a carpenter with less than two year’s experience is $10.00. The employer’s offered wage tremendously exceeds the median wage.” (A copy of the wage survey was enclosed). (AF-10-17)

On February 3, 2000, the CO issued a Final Determination denying certification. The CO reiterated its conclusions in its NOF that the wages set out under Davis-Bacon for the job category was not less than $23.80 per hour, and that such occupations covered by this Act are to be applied. (AF-7-9)

On February 8, 2000, the Employer filed a request for review of denial of labor certification. (AF-1-6).

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp., 1988-INA-24 (1989)(en banc). On the other hand, where the Final Determination does not respond to Employer’s arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not at issue before the Board. Barbara Harris, 1988-INA-32 (1989)

The only reason given in the Final Determination for denial of labor certification by the CO was that the failure on the part of Employer to rebut that the job opportunity was covered by the Davis/Bacon or Service Contract Act and that, therefore, the prevailing wage set out under either Act should be applied in this case. This Board has recently directly addressed the issues involved in the case of El Rio Grande, 1998-INA-133 (Feb. 4, 2000)en banc; Order granting reconsideration and affirming en banc decision (July 28, 2000).

Initially, we reject Employer’s argument that the prevailing wage determination under Davis-Bacon or SCA are not applicable to labor certification cases. That said, Employer has, also, contended that the prevailing wage for a carpenter as determined by the 1995 EDD California Occupational Guide Wage Supplement on which the CO acting on information furnished by EDD was $10.00 not the $23.80 determined by the CO. These two variations appear to be based on the 1994 survey for Los Angeles which has “Experienced” carpenters at $10.00 and union carpenters “three years with firm” at $23.80. This same survey listed “Experienced” union carpenters at $16.00 per hour. The burdens of persuasion in

such cases was set out in Rio Grande. Quoting from John Lehne & Sons, 1989-INA-267(May 1, 1992)(en banc) the Board stated although the initial burden rests with Employer, such burden presumes the employer knows the source and basis for the prevailing wage determination. Further, "...if an employer challenges the CO's Davis-Bacon wage determination in rebuttal, then the CO must provide a reasonable explanation of how the prevailing wage was determined from the Davis-Bacon schedule, and why it is appropriate under the circumstances."

Based on the record presented, the Board does not have adequate information to determine whether the Davis-Bacon wage determination made in this case was reasonable or unreasonable. Under the circumstances remand for clarification of the issue along with a reasonable explanation for the wage determination is required.

ORDER

The Certifying Officer's denial of labor certification is HEREBY VACATED and this matter REMANDED for additional proceedings consistent with the foregoing decision.

For The Panel:

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JOHN C. HOLMES
Administrative Law Judge